

10646 Formal Compliance Proceedings**10646.1 Overview**

Formal compliance proceedings may be used to litigate or compel compliance of almost any compliance issue under a Board order, including backpay, specific bargaining requirements, reinstatement, and successorship, alter ego or other derivative liability issues.

Compliance proceedings may be appropriate when a respondent disputes the Region's determination of net backpay or other compliance requirements. Compliance proceedings may also be appropriate to fully liquidate backpay liabilities or other compliance requirements even where no specific issue has been disputed by the respondent, but where the respondent has not cooperated or has asserted an inability to pay its liabilities. In those situations in which, pursuant to a judgment enforcing a Board order that does not liquidate backpay, the amount of backpay is computed and paid, there is ordinarily no need for compliance proceedings to formally liquidate backpay due.

Compliance proceedings may be appropriate whenever a legitimate dispute exists concerning compliance requirements under a Board order. However, when a respondent is refusing to comply with clear provisions of an enforced Board order, institution of contempt proceedings rather than or in addition to compliance proceedings may be warranted. See Section 10623.5 regarding criteria for recommending contempt proceedings.

Compliance proceedings are restricted to controversies arising from the requirements of remedial provisions of a Board order. They may not be used to relitigate underlying findings of violations of the Act or other issues already decided in the Board order. Formal compliance proceedings begin when the Region issues a compliance specification in which it alleges compliance requirements under the Board order. Issuance of the compliance specification leads to a supplemental hearing before an administrative law judge at which disputed issues are litigated, followed by the issuance of a supplemental decision and a Board supplemental decision and order that will direct the respondent to undertake clearly defined actions in compliance with provisions of its underlying order.

For example, a typical Board supplemental decision and order arising from disputed backpay issues will make findings concerning all the disputed compliance issues and then direct the respondent to pay a specified sum in net backpay, plus interest, to a discriminatee.

Compliance requirements under a Board supplemental order should be clear and not subject to continuing dispute. The Region may refer a Board supplemental order for enforcement, using procedures set forth in Section 10606. The following sections set forth procedures for undertaking formal compliance proceedings.

10646.2 Court Enforcement of Board Order Normally Required Before Compliance Specification May Issue

In general, a Board order should normally be enforced by a U.S. court of appeals before a compliance specification may be issued.

If compliance with a Board order cannot be resolved, it is generally appropriate to refer the case for initiation of enforcement proceedings, as set forth in Sections 10606 and 10608. There are situations when court enforcement is not required to issue a compliance specification. These situations are set forth in the sections immediately following. Although the Region should normally seek voluntary compliance with an enforced Board order or settlement of disputed compliance issues, it may initiate formal compliance proceedings at any time after a judgment has been entered enforcing the Board order. Formal compliance proceedings concerning 8(a)(3) and 8(b)(2) violations should be given the same priority as other 8(a)(3) or 8(b)(2) cases at various other stages. ULP Manual Section 11740.1. In cases with a court enforced Board order, the Region may issue a compliance specification without prior authorization from the Division of Operations-Management. Compliance proceedings also should be accelerated in cases where there appears to be a likelihood of collection problems, in no-answer default judgment cases or in cases when no exceptions are taken to the administrative law judge's decision. Compliance proceedings should also be accelerated in cases where issues of derivative liability are implicated.

10646.3 Compliance Proceeding Combined With Unfair Labor Practice Proceeding

In the following situations, where consolidation will facilitate full resolution of a dispute, Regions should consider consolidating compliance proceedings with underlying or related unfair labor practice proceedings (See Section 102.54(b) of the Board's Rules and Regulations):

- The backpay periods are of relatively short duration and have ended before the unfair labor practice hearing begins.
- Alter ego or other derivative liability issues arise prior to the opening of the hearing.
- Backpay or other compliance issues are relatively simple and their consolidation will not confuse, impede, or unduly prolong the unfair labor practice hearing.
- Where the respondent is likely to default, or has defaulted, with respect to the unfair labor practice complaint, and the case will be adjudicated in a summary manner.

In the above situations, a compliance specification should be prepared and served on the respondent in addition to the complaint. Novel or complex issues should be submitted to the Division of Operations-Management for clearance.

10646.4 Compliance Proceedings Without Court Enforced Board Order

See Section 10606.1

10646.5 Compliance Proceedings Based on a Compliance Stipulation

To forgo enforcement proceedings but litigate disputed compliance issues under a Board order, a respondent may enter into a stipulation that provides for compliance proceedings without enforcement of the Board order. If a respondent does not dispute the

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findings in a Board order that it violated the Act, but disputes specific remedial requirements, such a stipulation should be proposed as an alternative to enforcement proceedings to provide for compliance proceedings to address the compliance dispute.

10646.6 Unresolved Reinstatement Issues; Potential Contempt Issues

In some situations, reinstatement issues may provide a basis for contempt proceedings. As set forth in Section 10530.7, authorization from the Contempt Litigation & Compliance Branch is required before issuing a compliance specification when reinstatement issues are involved. Section 10606.2; Appendix 13.

10646.7 Sample Stipulation

See Appendix 13 for a sample stipulation providing for compliance proceedings under a Board order without court enforcement.

Among the provisions of the stipulation is a waiver of the respondent's right to contest the underlying findings of the Board order. Only compliance issues are subject to further litigation. The Regional Director has authority to approve the stipulation.

10648 Preparation of Compliance Specification and Notice of Hearing

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The basic purpose of the compliance specification is to narrow proceedings to those compliance issues in dispute and to set forth clearly the compliance requirements of those disputed issues.

Provisions of the Board order that have been complied with should not be addressed in the compliance specification.

For example, if a respondent has posted remedial notices, reinstated a discriminatee and complied with all other provisions of a Board order but disputes the Region's determination of backpay, the compliance specification should make allegations only concerning backpay.

In addressing the disputed compliance issues, the compliance specification should reflect the Region's determination of full compliance requirements, regardless of any positions taken or offers made during settlement efforts. Section 10592.15. The specification should be as specific, detailed, and accurate as the circumstances of the case permit. Each affirmative allegation should be set forth to call for an admission or a denial in the respondent's answer. With respect to allegations concerning backpay, the specification should set forth all relevant facts upon which backpay was determined, such as the dates the backpay period began and ended, wage rates in effect for relevant employees, the appropriate method for determining backpay, arithmetic calculations, and the resulting amount of net backpay due. With respect to allegations concerning issues other than backpay, the specification should allege clearly all aspects of the respondent's failure to fully comply with the Board order, including a description of any specific conduct at issue, the names of respondent's representatives who engaged in this conduct and the dates and places where the conduct occurred, leading to allegations as to affirmative actions required to comply.

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In the interest of protecting individuals' right of privacy, social security numbers should never be included in compliance specifications. To the extent it is necessary to identify individuals by social security numbers in any such document, only the last 4 digits of the social security numbers should be used. The format of the number would be ###-##-____. To the extent any document containing a social security number must be released to the public, care should be taken to redact these numbers.

10648.2 Regional Authority to Issue Compliance Specifications

A compliance specification is prepared and served over the signature of the Regional Director. Sections 102.54 and 102.55 of the Board's Rules and Regulations.

10648.3 All Joint Respondents to be Named

All respondents to the compliance proceeding should be named in the caption of the compliance specification and served. See Section 10650.3. Respondents that should be named include all jointly liable respondents, sole proprietors, partners, successors, alter egos, joint employers, fraudulent transferees, and individuals against whom individual liability is sought. (For example, in the case of a sole proprietorship, John Leakey, d/b/a Leakey Plumbing, or, in the case of a partnership, John Leakey and Mary Leakey, d/b/a Leakey Plumbing.)

Additionally, the Region should ensure that Board orders include the correct caption, in full, and that the "order" section specifies by name the individual owners who are personally liable for compliance. Where recommended orders do not fully and accurately set forth all responsible individuals, a motion should be filed with the administrative law judge for the necessary corrections. Likewise, an appropriate motion should be made to the Board if its order presents the same omission.

In cases of joint and several liability, even when one of the parties has paid its share of backpay, it should nevertheless be named as a respondent in the compliance specification. Section 10592.13.

10648.4 Burdens of Proof

The Region's burden of proof in compliance proceedings regarding allegations other than those that pertain to backpay is generally the same as its burden in an underlying unfair labor practice proceeding, that is, allegations must be proved by a preponderance of evidence.

In backpay cases, the Region's specific burden is to establish that the gross backpay formula and amount is reasonable. Section 10540.1. Normally, it will not aid the General Counsel's case to litigate defenses not properly raised by the respondent. Section 10662.3.

In cases where the respondent has not cooperated by providing records needed to determine or calculate backpay, allegations should be based on other sources of information or fair approximations. Any doubts should be resolved against the respondent. The respondent's noncooperation should be pled and the Region should ask the Board for an order precluding the respondent from introducing previously demanded records in order to contest gross backpay. Cf. Fed.R.Civ.P. 37(b)(2)(B).

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It is also the Region's burden to establish expenses incurred by the discriminatees in seeking or maintaining interim employment that should be offset against interim earnings. Section 10556. Further it is the Region's burden to establish expenses incurred by the discriminatees to obtain replacement benefits such as health insurance, retirement policies, and 401(k) plans.

Even where discriminatee expenses are minimal, allegations concerning expenses incurred in seeking employment should be included in the specification, because they support discriminatee mitigation efforts. Section 10558.

All elements of a backpay case that reduce the respondent's gross backpay liability, such as interim earnings and mitigation, are the respondent's burden.¹⁵⁴ The Region, however, should include in a compliance specification interim earnings, a failure to mitigate and other facts that reduce gross backpay that have been established to the Region's satisfaction during the course of the backpay investigation.

If the respondent establishes that the discriminatee quit an interim job, it becomes the burden of the General Counsel to demonstrate that the decision to quit was reasonable. Sections 10558.4 and 10666.8.

10648.5 Affirmative Allegations

The compliance specification should plead all compliance issues for which the Region has the burden of proof in the form of affirmative allegations.

Complaint pleading manual paragraphs should be followed as closely as possible for alleging nonbackpay issues.

The specification should affirmatively plead the ultimate facts on which successorship, individual liability or other derivative liability is sought. Regarding backpay, the compliance specification should contain affirmative allegations regarding all the basic facts, such as the dates of the backpay period, rates of pay and hours worked by replacement employees, the method used to determine gross backpay, and the calculations leading to a resulting backpay amount due.

Allegations set forth in the specification should generally be supplemented with appendices that set forth and summarize underlying facts and figures and the calculations applied to them to show gross backpay, interim earnings or other adjustments and final net backpay for each discriminatee.

Appendices may be produced using computer spreadsheet programs now available in the Regions.

Calculations should be based on calendar quarters. Final net backpay is the sum of net backpay due for each quarter of the backpay period. Section 10564.2.

10648.6 Pleading Issues for Which the Respondent Bears the Burden of Proof

The compliance specification should not plead allegations concerning issues for which the respondent has the burden of proof. Where established to the Region's satisfaction, these issues should be included in the specification. For example, the

¹⁵⁴ *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 655 (1989); *Colorado Forge Corp.*, 285 NLRB 30, 538 (1987); *Rainbow Coaches*, 280 NLRB 166, 179–180 (1986).

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compliance specification should set forth the interim earnings of each discriminatee. See Section 10550 regarding interim earnings.

The Region should only include interim earnings that it has concluded should be offset against gross backpay, even if the respondent disputes the Region's conclusions and is expected to raise the issue in the compliance hearing. The Region should not plead allegations concerning interim earnings in anticipation of respondent arguments. Rather, the respondent will bear the burden in the compliance hearing of proving that additional interim earnings should be offset against gross backpay.

If the Region has concluded that there is no net backpay entitlement for a discriminatee, either because interim earnings exceeded gross backpay for every quarter of the backpay period or the discriminatee was unavailable for interim employment throughout the backpay period, the compliance specification should not include that discriminatee.

If the Region has concluded that a discriminatee was available for interim employment or has met his or her obligation to mitigate, it should not set forth these conclusions in the compliance specification as affirmative allegations, even if the issues are close, or if it expects the respondent to raise these issues in the compliance hearing. Rather, net backpay due the discriminatee should be set forth on the basis of allegations concerning gross backpay, with no deduction. It will be the respondent's burden at the compliance hearing to prove that deductions from gross backpay are warranted as a result of these issues.

If the Region has concluded that a discriminatee was unavailable for interim employment or failed to meet his or her obligation to mitigate for part of the backpay period, this should be included in the compliance specification, with the appropriate periods set forth.

See Sections 10558 and 10560 regarding mitigation and issues concerning unavailability for interim employment.

10648.7 Missing or Uncooperative Discriminatees

The Board's backpay remedy is a public and not a private right and is directed primarily towards effectuating the purposes of the Act; that is, to discourage the commission of unfair labor practices. Failure to pursue backpay for missing or uncooperative discriminatees would, in effect, ignore the Board's obligation of effectuating remedies awarded in Board orders and court judgments. Thus, backpay should be alleged in the compliance specification for missing and uncooperative discriminatees.¹⁵⁵ See also Sections 10548.3 and 10562.4.

If a discriminatee is missing at the time of hearing or has been uncooperative during the investigation of the backpay claim and interim earnings data has not been obtained, the compliance specification should include the claim at the level of full gross backpay. No admission should be made concerning interim earnings and employment.

¹⁵⁵ See, for example, *Steve Aloi Ford, Inc.*, 190 NLRB 661 (1971); and *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648 fn. 5 (1989).

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Net backpay will thus be the same as gross backpay in these cases.¹⁵⁶ The respondent will have the burden of proving any offsets to gross backpay.

See Section 10662.4 regarding the scope of the Region's responsibility for making discriminatees available as witnesses for the respondent. See Section 10662.7 for the statements to be made at hearing regarding discriminatees who are not present to testify. See Sections 10582.3 and 10584 regarding holding of funds and extinguishment of backpay entitlements for missing discriminatees.

10648.8 Deceased Discriminatees

Backpay should be claimed for deceased discriminatees in the compliance specification¹⁵⁷ and, when collected, paid as provided in Section 10576.6.

Because the date of death is a fact that reduces the respondent's gross backpay liability, it should not be affirmatively pled in the compliance specification, but stated if known. If the Region cannot establish the date of death, it is the respondent's burden to prove it.

10648.9 Special Remedies

When the relief being sought is novel or unique, the specification should contain a specific request for that remedial relief, in order to provide respondent adequate notice. Such a request should specifically reserve the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy.

10648.10 Preparing Tabulations and Charts Explaining Computations

Consideration should be given to attaching charts, tables, or summaries to the compliance specification as exhibits. Exhibit charts, tables, and summaries are particularly helpful to illustrate complex gross backpay computations and to summarize voluminous records relied upon by the Compliance Officer during preparation of the compliance specification. Computer software programs, such as Excel and Access, are extremely helpful when preparing exhibit summaries. See generally Rule 1006 of the Federal Rules of Evidence.

For example, if the General Counsel contends, over respondent opposition, that a pay raise would have been received by the discriminatees during the backpay period, an exhibit table, summarizing data obtained from the gross employer's records, may be prepared to support the General Counsel's position. This exhibit may include information regarding the name and job classification of each employee who received a raise during the backpay period, the amount of each raise and the date each raise was received. By way of further example, exhibit summaries may be helpful concerning bonuses paid, the transfer of employees between departments and jobsites, the order of employee layoff and recall, and/or overtime opportunities, among others.

10648.11 Sample Specification

See Appendix 17 for a sample compliance specification and notice of hearing that may be used as a guide. Note the following considerations:

¹⁵⁶ *Iron Workers Local 373 (Building Contractors)*, supra at 655 fn. 41.

¹⁵⁷ *St. Regis Paper Co.*, 285 NLRB 293, 295 (1987).

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A. Paragraph designation: The paragraph designation system of the sample specification may be altered to accord with Region practice or the requirements of a particular case. However, there should be a paragraph and subparagraph outline consistently lettered or numbered to enable the respondent in its answer to refer to the specification by paragraph and subparagraph for the purpose of making denials, admissions, and explanations with the specificity required by Section 102.56 of the Board's Rules and Regulations. See Section 10652 regarding the requirements of an answer to a compliance specification. Because the sample specification is illustrative, only the first of each of the various appendices referred to in various paragraphs of the text is reproduced.

B. Demand for interest: Because the Board includes interest accrued on back wages as part of the make-whole remedy, the summary in paragraph 10 of the sample specification indicates that interest is to be added to the amounts of net backpay found due. Because the date of payment and hence the interest amount on backpay are not known at the time the compliance specification is issued, partial amounts of interest should not be set forth in the specification.

10648.12 Sample of Specification With Computation in Text

In complex cases, when varying circumstances, pay rates, job classifications, and backpay periods must be considered, it may be helpful to set forth a separate specific computation with separate allegations in the text, as in the following sample, rather than to attach separate appendices for each discriminatee. In using this format, the description of the basic method of computing gross backpay with supporting tabulations must be noted in a prior section of the specification, while the name of each discriminatee should be preceded by a numeral or letter (as appropriate in accordance with the outline being used for the specification as a whole) so that the denials, admissions, or explanations of the respondent's answer may be easily keyed to the specification.

For example: I. Boyd, Alvy:

- a. Boyd's backpay period begins February 13, 20__, and ends July 25, 20__.
- b. Boyd was employed in the job classification "mechanic repairman" at the pay rate of \$7 per hour prior to discrimination.
- c. Boyd's interim employment and earnings are as follows and it is alleged his expenses are as follows:

Calendar Qtr.	Remarks	Interim Earnings	Expenses
20__-1	Unemployed	None	
20__-2	Transportation seeking work	----	\$ 6.00
	Self-employed	\$262.50	
	Transportation seeking work—\$4	----	
	Transportation to and from work—\$22.50	----	\$26.50
20__-3	Self-employed	\$ 87.50	
	Transportation to and from work	----	\$ 7.50

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d. Boyd's gross and net backpay by calendar quarters are set forth below:

Calendar Qtr.	Hours & Pay Rates	Gross Backpay	Net Interim Earnings	Net Backpay
20__-1	321 at \$7.00	\$2,247.00	\$ 0.00	\$2,247.00
20__-2	616 at \$7.00	\$4,312.00	\$1,200.00	\$3,112.00
20__-3	145 at \$7.00	\$1,015.00	\$ 800.00	\$ 215.00

10650 Procedures Following Issuance of Compliance Specification

10650.1 Complaint Case Procedures Generally Applicable

The procedures and trial techniques noted in ULP Manual Sections 10250 through 10452 covering formal proceedings in complaint cases should be followed, except where they are inconsistent with this manual, the Rules and Regulations, or are otherwise inappropriate or inapplicable. Sections 102.52 through 102.59 of the Board's Rules and Regulations should be observed.

10650.2 Procurement of Hearing Date

The procedures of ULP Manual Section 10268.2 should be followed, substituting "Compliance Specification" for "Complaint." The last paragraph of ULP Manual Section 10268.2 does not apply to compliance proceedings. The answer requirement should set forth a date 21 days from issuance, unless that date is a holiday. Section 102.56(a) Board's Rules and Regulations.

10650.3 Service of Compliance Specifications

A copy of the compliance specification and notice of hearing should be served on each named original and additional respondent and on the charging party by certified mail or as otherwise provided by Section 102.113 of the Board's Rules and Regulations as far in advance of the hearing as practical, and, in any case, at least 21 days before the date set for the hearing.

10650.4 Notice to Discriminatees

The discriminatees and all potential witnesses should be notified of the hearing date by letter and advised that the trial attorney and/or Compliance Officer will call them prior to the hearing for an interview. They should also be advised of the possibility that they will be subpoenaed to testify at the hearing.

10650.5 Disclosure of Factual Information Relevant to the Compilation

It is Board policy to make available to the respondent, on request, and after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement. This policy does not apply where the respondent has refused to cooperate in the Region's backpay investigation.

Disclosure prior to issuance of a compliance specification is not required. Requests for disclosure prior thereto should be refused, unless the Regional Director determines that such disclosure will enhance possibilities of settlement.

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This disclosure policy extends to information contained in documents in the possession of the Region, including, compliance affidavits, discrete portions of initial affidavits that directly concern the discriminatee's backpay calculation or other documents concerning discriminatee interim employment and earnings, search for employment, or availability for employment.

The disclosure policy pertains only to backpay or related computations, and does not require disclosure of information relating to other issues, such as successor employer, single employer, joint employer, alter ego, disguised continuance, or personal liability.

Making the relevant documents available to respondent for review and copying, after appropriate redactions have been made, will normally satisfy this disclosure policy. It should be made clear to a respondent requesting this information that it is not routine public information, and it is to be supplied only for use in this compliance proceeding. As regional compliance files often contain confidential information not subject to disclosure, as discussed below, respondent should not be granted free access to "look through" the compliance file.

When implementing this policy, care should be exercised to ensure that confidentiality and privacy protections, afforded to individuals identified in compliance documents and to neutral third parties who provide documents during the compliance investigation, are maintained. See Sec. 102.117 of the Rules (Freedom of Information Act).¹⁵⁸

The following sample list of documents gathered during compliance backpay investigations is provided as a general guide to Regions regarding document disclosure pursuant to this policy. Any questions regarding document disclosure pursuant to this policy should be referred to the General Counsel's FOIA Officer, Division of Advice, Legal Research Section, in Headquarters.

1. Documents provided to the Region by a discriminatee, concerning himself/herself, that may be disclosed without redaction (except for the discriminatee's social security number):

- paycheck stubs, timecards, work schedules—at respondent and interim employers,
- W-2 Income Tax Forms,
- documents showing the payment by the discriminatee of union dues and initiation fees,
- documents showing search for work expenses, such as mileage logs, telephone, postage and photocopy receipts,
- discriminatee search for work log submitted to a state unemployment office,
- documents showing interim employment expenses, such as motel bills, groceries, uniforms, work shoes, mileage, and toll receipts,

¹⁵⁸ Particular care must be taken before disclosing commercial or financial information gathered during the compliance investigation from third party interim employers as this information may be protected from disclosure by the Freedom of Information Act Exemption 4. See Sec. 102.117(c)(2)(iv). See also *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992), cert denied 113 S.Ct. 1579 (1993).

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- documents showing payment by the discriminatee for medical insurance, if claimed,
 - documents showing discriminatee contributions to benefit funds, 401(k), and/or mutual funds, if claimed.
2. Documents provided to the Region by a third party, regarding a discriminatee, that may be disclosed without redaction (except for the discriminatee's social security number):
- report from a Government agency showing the earnings of the discriminatee only, at respondent and interim employees,
 - report from a Government agency showing search for work expenses of the discriminatee only,
 - correspondence from interim employers setting forth earnings of the discriminatee only.
3. Documents provided to the Region by a discriminatee that may be disclosed following redaction of confidential information:
- Compliance affidavit/questionnaire from the discriminatee. Redact the name and personal identifying information of anyone other than the discriminatee named in the affidavit/questionnaire. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.
 - Initial affidavit from the discriminatee. The disclosure should be limited to discrete portions of the affidavit that concern the backpay calculation, such as hourly rate and average overtime hours worked when employed at Respondent, initial search work for efforts during the investigation, etc. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.
 - Income Tax Returns. All information unrelated to discriminatee earnings should be redacted, such as the social security number and wages of the discriminatee's spouse, dependent information, alimony, medical information/deductions, investments, charitable donations, etc.
 - Calendars, logs, and diaries kept by the discriminatee documenting search for work or interim employment, such as days and hours worked in the construction trade. Names, personal identifiers, and information regarding individuals who are not named discriminatees should be redacted.
 - Documents showing discriminatee medical expenses, if claimed. Confidential medical diagnosis and treatment information should be redacted.
 - Canceled checks and discriminatee bank statements. (These documents may be submitted to support expenses claimed by the discriminatee.) Redact the discriminatee's checking account number from checks and bank statements.

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Redact all information on the bank statements not directly related to expenses claimed or interim earnings. For jointly held checking accounts, redact all information unrelated to the discriminatee.

- Credit card statements. (These statements may be submitted to support expenses claimed by the discriminatee.) Redact the discriminatee's credit card number. Redact all information on the credit card statements not directly related to expenses claimed. For jointly held credit card accounts, redact all information unrelated to the discriminatee.

4. Documents provided to the Region by a third party, regarding a discriminatee, that may be disclosed following redaction of confidential information:

- Compliance affidavits from individuals other than the named discriminatee. Redact the name and personal identifying information of the affiant and anyone other than the discriminatee named in the affidavit. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.
- Initial affidavits from individuals other than the discriminatee. Redact the name and personal identifying information of the affiant and anyone other than the discriminatee named in the affidavit. The disclosure should be limited to discrete portions of the affidavit that concern the backpay calculation, such as hourly rates paid and average overtime hours worked at Respondent, etc. Redact any intimate details of a personal nature having only slight relevance to the backpay inquiry, such as details of medical conditions, marital status, alcohol consumption, family fights, among others.
- Payroll information received from interim employers. Redact all information not pertaining to the discriminatee, such as names, social security numbers, wage, hour and benefit information regarding other individuals.
- Medical information received from interim employers. Redact all confidential medical diagnosis and treatment information. Redact any information not pertaining to the discriminatee, such as names, social security numbers, medical expense and treatment information regarding other individuals.
- Fund contribution records received from a benefit fund or union. Redact all information not pertaining to the discriminatee, such as names, social security numbers, wage, hour and benefit information regarding other individuals.
- Reports from a Government agency showing wages paid and benefits to employees of respondent or an interim employer. Redact all information not pertaining to the discriminatee, such as names, social security numbers, and wage, hour and benefit information regarding other individuals.

5. Documents that should not be disclosed to respondent pursuant to this policy:

- Documents that reflect the deliberative or policy-making processes of the agency, such as final investigative reports, agenda minutes, comments on

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appeal, internal advice or appeals memoranda to the General Counsel, board agent file notes, among other documents.

- Documents that reflect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, such as trial attorney pretrial preparation notes, and position statements received from charging party counsel.
- Information that would not normally be available to a party in private litigation.
- Identification of confidential sources of information to the agency, such as the names and personal identifiers of individuals other than the discriminatee.

10652 Analysis and Response to Respondent's Answer to Compliance Specification

10652.1 No Answer Filed

Section 102.56(c) of the Rules and Regulations provides that, absent a denial or an adequate explanation, the Board may deem respondent to have admitted and may preclude it from controverting, the corresponding allegation(s). If respondent fails to file an answer within the time initially allowed, the trial attorney should communicate in writing with respondent's counsel or, if not represented, directly with respondent, to advise that notwithstanding the Board's Rules and Regulations, respondent failed to file an answer.¹⁵⁹ The trial attorney should extend respondent's deadline to do so, normally no more than 1 week, and advise that the General Counsel will otherwise file a motion for default judgment.¹⁶⁰

If respondent still files no answer by the extended deadline, the Region should file a motion for default judgment with the Board, which will typically either deny the motion or issue an order to show cause as to why it should not be granted and postpone the hearing. In filing motions, the Region should observe ULP Manual Sections 10290 and 10292.¹⁶¹

10652.2 Answer Filed, Allegations Not Explicitly Denied

Section 102.56(b) of the Board's Rules and Regulations provides that if the respondent disputes the accuracy of the backpay amount or the premises on which it is based as alleged in the compliance specification, its answer to the compliance specification shall specifically state the basis for the disagreement, setting forth in detail the respondent's position as to applicable premises and furnishing appropriate alternative figures and amounts. General denials by the respondent to allegations regarding the calculation of backpay are not sufficient and do not comply with the requirements of Section 102.56(b) and (c) of the Rules and Regulations. Pursuant to a motion for

¹⁵⁹ Although the Region normally will bring the failure to file to respondent's attention and provide a brief period to correct the deficiency, it need not do so. *T-3 Group Ltd.*, 339 NLRB 796 (2003); *Superior Industries International*, 289 NLRB 834 fn. 13 (1988).

¹⁶⁰ This procedure parallels Section 10280.3 of the ULP Manual. Until 2003, the Board historically had treated motions for judgment based on a respondent's failure to answer a complaint or compliance specification as motions for summary judgment. As (revised) OM 04-20 notes, the Board has decided that the term "default judgment" more accurately describes a judgment based on a failure to answer.

¹⁶¹ Section 102.24(b) of the Board's Rules and Regulations sets forth requirements for the timely filing of motions for default judgment.

summary judgment, the administrative law judge or the Board may deem these allegations to be admitted as true.

The trial attorney should carefully analyze the answer, comparing it point-by-point with the specification, to note allegations in the specification that respondent admitted or did not explicitly answer. If the answer is defective, the Region should consider filing a motion for summary judgment or partial summary judgment, as appropriate.

The Region should move at the compliance hearing that the administrative law judge deem allegations not properly answered be admitted without taking evidence in support of the allegations and precluding the respondent from offering evidence to controvert them. Section 10662.2.

Before filing either a motion with the Board or with the administrative law judge, the trial attorney should advise the respondent in writing that the answer is deficient and, following the procedures in Section 10652.1, allow the respondent a period of time, typically not to exceed 1 week, to file an amended answer.

General denials by the respondent with respect to the allegations concerning the interim earnings and mitigation of the discriminatees and to the allegations relating to issues other than the computation of backpay, such as alter ego or successor status, will suffice to require a hearing.¹⁶²

10654 Amendment of Compliance Specifications

Section 102.55(c) of the Rules and Regulations gives the Regional Director discretion to amend the specification after the issuance of the notice of hearing and prior to the opening of the hearing and, after the opening of the hearing, on leave of the administrative law judge or the Board for good cause.

In the event that newly-acquired information prompts the Region to decide to adjust allegation(s) in the specification, either prior to or during the hearing, it is helpful to advise the judge and parties of the Region's intent to amend the specification and, as soon as practicable, to provide them with any exhibit or appendix showing new calculations that the Region will move to substitute.

10656 Withdrawal of Specification on Compliance

10656.1 Before the Compliance Hearing

Upon compliance or settlement, the Regional Director may withdraw the compliance specification on receipt of backpay. Standards set forth in Section 10592 apply after a compliance specification has issued. When authorization from the Division of Operations-Management is required to accept a settlement, the Region should not withdraw the compliance specification until it has obtained authorization. In general, the Region should not withdraw the compliance specification until respondent has actually remitted all backpay and has otherwise complied fully.

¹⁶² See, for example, *Best Roofing Co.*, 304 NLRB 727, 728 (1991); *Castaways Management, Inc.*, 303 NLRB 374, 375 (1991).

10656.2 Case Pending Before Administrative Law Judge

The same criteria as above govern withdrawal of the compliance specification at this stage except that withdrawal requires leave by the administrative law judge.

10656.3 After Transfer of Case to the Board

If a proposed settlement agreement is obtained at this stage, the Region should file a motion with the Board to remand the matter to the Regional Director for compliance.

10658 Preparation for the Compliance Hearing**10658.1 Overview**

Appropriate preparation is critical to the successful litigation of a compliance specification. The trial attorney must carefully analyze and review the Board order, court judgment, compliance specification, and answer. The trial attorney must become familiar with the distinctions between litigation of a compliance specification hearing and an unfair labor practice trial, most importantly the specific burdens of proof accorded the General Counsel and respondent, as set forth in the Board's Rules and Regulations regarding compliance specifications and answers.¹⁶³ See Sections 10648.4–10648.6; Rules and Regulations Sections 102.55 and 102.56. The trial attorney should be familiar with the compliance case file and any relevant information contained in the underlying investigative and trial files.

At the outset, the trial attorney should discuss preparation with the Compliance Officer, who may be required to testify at the hearing. Since the Compliance Officer is an invaluable resource to the trial attorney, possessing considerable knowledge of the records gathered and analyzed during the compliance investigation, together with a thorough understanding of the General Counsel's theories, as set forth in the compliance specification, a collaborative working relationship between the trial attorney and the Compliance Officer will enhance prehearing preparation and litigation of the compliance specification.

The compliance hearing is conducted in a manner similar to an unfair labor practice hearing. Generally, procedures set forth in ULP Manual Sections 10330 and 10352 are applicable. Considerations particular to compliance proceedings are addressed below.

10658.2 Arrangement for Production of Records, Service of Subpoenas, and Pretrial Stipulations

The trial attorney should subpoena and, if possible, make advanced arrangements for the production of the original records necessary to prove backpay or other affirmative allegations contained in the compliance specification. If the gross backpay computations are in dispute, the records of the gross employer, whether or not it is a respondent,¹⁶⁴ on which the gross backpay computation was based, should be available at the hearing. Thus, if the gross backpay figure is challenged at any point, supporting evidence will be available and appropriate portions may be copied for use at the hearing.

¹⁶³ See *Minette Mills, Inc.*, 316 NLRB 1009, 1010–1011 (1995).

¹⁶⁴ The gross employer is the employer where the discriminatee was employed at the time of the unfair labor practice.

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Subpoenas ad testificandum and duces tecum should be issued to ensure the availability at hearing of all relevant testimony and documents needed to prove the compliance specification allegations that are the General Counsel's burden and to rebut anticipated respondent defenses. Sections 10648.4–10648.6. ULP Manual Sections 11772–11784. See ULP Manual Sections 10340, 11778, and 11782.4 with regard to the service of subpoenas.

Where appropriate, prehearing efforts should also be made to obtain factual stipulations concerning matters contained in the records or matters that are not subject to controversy. Stipulations should contain detailed, factual assertions and should not be conclusionary. ULP Manual Section 10392. Records gathered during the compliance investigation, either voluntarily or in response to an investigative subpoena, should be carefully reviewed and analyzed prior to the hearing. Relevant records should be prepared, copied, and marked, for introduction into evidence at the hearing. ULP Manual Sections 10334.1, 10338, and 10398. Where helpful to explain the General Counsel's theory of the case, appropriate charts, tables or summaries of voluminous or complex records should be prepared for introduction into evidence. Section 10660.2. Rule 1006, Federal Rules of Evidence.

10660 Preparation of Testimony and Evidence Concerning Gross Backpay Computation and Discriminatee Expenses

10660.1 Testimony of Compliance Officer

Where respondent's answer disputes the accuracy of the gross backpay figures or the premises on which they are based and respondent's answer satisfies the requirements set forth in the Board's Rules regarding specificity, testimony of the Compliance Officer is generally appropriate to describe the factual information used to calculate the gross backpay figures and explain the rationale for the method selected to compute backpay. Section 10652.2; Sections 102.56(b) and (c), Rules and Regulations. The trial attorney should prepare the Compliance Officer to testify concerning the basis of the computation and the reasons for selecting the gross backpay formula set forth in the compliance specification.

The trial attorney should also prepare the Compliance Officer for cross-examination, and advise the Compliance Officer of potential areas of cross-examination based on prior discussions with the respondent's counsel, respondent's answer, and the Region's participation in any prehearing conferences with the administrative law judge. Sections 10660.7 and 10660.8. As appropriate, the Compliance Officer should also be prepared to testify concerning the propriety of any alternative computation offered by the respondent.

As specifically relevant to compliance proceedings, Regional Directors may consider and decide whether or not to approve requests for authorization to permit Board agent testimony and document disclosure under Section 102.118, in the name of the General Counsel, (a) when Compliance Officers, and other Board agents serving in a Compliance Officer role testify at compliance proceedings with regard to the compliance specification preparation and (b) when Board agent testimony is necessary to establish that a respondent has failed to perform an affirmative act pursuant to a court enforced

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Board order. As set forth in detail in GC Memos 94-14, 98-7, and 98-9, the General Counsel has delegated the authority to permit Board agent testimony and disclosure of documents under Section 102.118, Rules and Regulations. A complete description of the authority delegated by the General Counsel under Section 102.118 of the Rules, is outlined in ULP Manual Section 11824.1.

10660.2 Preparing Supplementary Tabulations; Explaining Computation; Answering Defenses

Occasionally following review and analysis of the subpoenaed records, it may be advisable to prepare and offer into evidence amended attachments to the compliance specification, specifically outlining the updated, most accurate, calculations for the gross and net backpay figures available to the General Counsel. Sections 10648.10 and 10654; Sections 102.55(c) and 102.56(e), Rules and Regulations. Consideration should be given to the introduction into evidence of charts, tables, or summaries to illustrate the Compliance Officer's testimony. Where appropriate, summaries of relevant data obtained from subpoenaed records may be introduced into evidence to support the General Counsel's theory of the case or rebut respondent defenses. Rule 1006, Federal Rules of Evidence.

10660.3 Testimony of Discriminatees Regarding Gross Backpay Computation

On occasion, elements of the gross backpay calculation may be established through testimony of the discriminatees or other employees of the gross employer. For example, discriminatee or employee witness testimony may be used to establish the identity of the employee who replaced the discriminatee, changes in employment conditions during the backpay period and eligibility for fringe benefits, among other elements of the gross backpay calculation. Any prospective witness must be interviewed and properly prepared for trial. ULP Manual Sections 10334.2, 10334.4, and 10394.1–10394.10. Where appropriate subpoenas ad testificandum should be issued. ULP Manual Sections 11772 and 11774.

10660.4 Testimony of Discriminatees and Evidence Concerning Expenses

The General Counsel has the burden of establishing expenses incurred by discriminatees in seeking and holding interim employment that are deductible from their interim earnings. Sections 10556 and 10648.4. Expenses may be established by discriminatee testimony even where there is no documentary evidence of expenses. The trial attorney should prepare the discriminatees for such testimony. See Sections 10394.1–10394.10. ULP Manual Sections 10334.2 and 10334.4. During prehearing preparation or during hearing testimony, if new expenses are established, the General Counsel should prepare and offer into evidence revised attachments to the compliance specification, setting forth the updated, most accurate expense and net backpay figures available to the General Counsel.

10660.5 Preparation of Discriminatees for Examination by Respondent

Respondent's counsel may examine the discriminatees concerning their efforts to seek work during periods of unemployment. When this is expected, the trial attorney should interview and prepare the discriminatee for testimony concerning the details of interim employment, earnings, expenses, and search for work. Although much of this

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information is not within the General Counsel's burden of proof, the trial attorney should prepare the discriminatees for cross-examination regarding these matters. Prehearing preparation will ensure that each discriminatee's testimony will comport with the facts and be consistent and credible. As a result, the record will be clear and concise and will present the facts fully.¹⁶⁵

Therefore, during prehearing preparation, all discriminatees should be cross-examined in preparation for the kind of cross-examination they will receive at the hearing, particularly concerning their efforts to find work during periods of unemployment and low earnings. The trial attorney should instruct each discriminatee witness that the truth is expected at all times, regardless of who may be helped or harmed. ULP Manual Section 10334.4. As appropriate, they should be reminded that where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment. Section 10550.5

The respondent may not examine the discriminatees or present other evidence regarding their interim employment, earnings, expenses, and search for work, unless respondent has raised these issues in its answer. Objections should be appropriately raised. Section 10652.2; Section 102.56(b) and (c), Rules and Regulations.

The trial attorney should review with each discriminatee his/her anticipated testimony regarding interim employment, earnings, expenses, and search for work. Each discriminatee should be prepared to account for his employment history during the backpay period. All relevant documents should be reviewed with each discriminatee to refresh his/her recollection regarding search for work and employment during the backpay period.¹⁶⁶ Documentation may include:

- board affidavit,
- questionnaires they provided to the Compliance Officer during the backpay period,
- pay slips,
- earning reports and W-2 tax statements received from interim employers,
- records supplied to or received from state unemployment departments,
- union hiring hall and fund contribution records,
- help wanted advertisements regarding jobs where they applied,
- detailed calendars or diaries.

It is common in certain trades, such as construction, for employees to maintain, detailed calendars or diaries regarding their interim employment. The trial attorney should specifically ask each discriminatee what writings, if any, they have reviewed in

¹⁶⁵ For general principles regarding interviews of witnesses, see ULP Manual Sections 10054.2 and .3; regarding credibility, see ULP Manual Section 10064.

¹⁶⁶ See generally, Rules 612, 613, 801, and 803(5) of the Federal Rules of Evidence. See also ULP Manual Sections 10394.6–10394.10; Division of Judges Bench Book Sections 13-612, 13-613.

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preparation for the compliance hearing.¹⁶⁷ ULP Manual Sections 10394.6–10394.10. Relevant documents should be prepared for introduction into evidence, including records received from state unemployment departments.¹⁶⁸ Each discriminatee should be prepared to testify as precisely as possible regarding the names of the firms where they sought interim employment, whether they filed written applications, the dates they filed applications or made job inquiries, and the names of the individuals they spoke with at each firm.

10660.6 Expert Witness Testimony

In appropriate cases, the General Counsel should consider offering expert witness testimony at the compliance hearing. This may be particularly appropriate in cases where gross backpay, interim earnings, reimbursable expenses, or other monetary remedies were calculated using statistical sampling or modeling techniques. These techniques may be used in cases involving numerous discriminatees or where interim earnings data is difficult to obtain or extremely time consuming to analyze, such as in cases involving strikers, hiring hall referrals, or numerous construction sites. Sections 10548–10548.3. The expert witness may be an accountant, a statistician, a financial consultant, a management professor, or a labor economist knowledgeable regarding the local labor market conditions during the backpay period. Where the Region is considering payment of special fees for expert testimony, clearance should be sought from the Division of Operations-Management.

Rule 702 of the Federal Rules of Evidence sets forth the standard for the admissibility of expert testimony at trial:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. . . .

To be admissible, expert testimony must not only be relevant, but reliable.¹⁶⁹ Once received, the administrative law judge may disregard expert testimony if the analysis and conclusions are based upon flawed premises.¹⁷⁰

If a party seeks to present expert witness testimony at the hearing, among the factors the administrative law judge will consider are “whether the party has given prior notice to the opponent, [whether the party has] supplied copies of any documents or test results [to the opponent], and whether there has been time for the opponent to [obtain] opinion testimony by an expert of the opponent’s selection.” Division of Judges Bench Book Sections 13-226; Rules 403 and 702 of the Federal Rules of Evidence. Affirmative efforts should be made by the trial attorney to ascertain whether respondent intends to

¹⁶⁷ At the beginning of examination by respondent counsel, the discriminatee may be asked to state what writings he reviewed prior to testifying. The administrative law judge may require that any reviewed writings be produced to respondent for use during the witness’ examination. See Rule 612(2) of the Federal Rules of Evidence.

¹⁶⁸ Records regarding unemployment compensation may include unemployment compensation booklets, noting the dates when the discriminatee applied for unemployment compensation. Records received from state unemployment departments often may be obtained from the state unemployment department and prepared for introduction into evidence in a manner providing for their self-authentication at trial. See Rule 902 of the Federal Rules of Evidence.

¹⁶⁹ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 585–586 (1993).

¹⁷⁰ See *Food & Commercial Workers Local 1357*, 301 NLRB 617, 619, 621–622 (1991). See Division of Judges Bench Book Sections 13-220, 13-221.

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call an expert witness during its defense case and, if so, the identity of that witness. Specific inquiry should be made by the trial attorney during the prehearing conference with the administrative law judge regarding whether respondent intends to call an expert witness, if this information has not been clarified beforehand. Section 10660.8. Where respondent discloses that it will call an expert witness at the hearing, the trial attorney should carefully prepare for the cross-examination of respondent's expert witness. Appropriate rebuttal witnesses should be subpoenaed and interviewed prehearing. Additionally, in consultation with Regional management, a decision should be made expeditiously regarding whether it is beneficial for the General Counsel also to present expert witness testimony at the compliance hearing.

For example, to support its contention that a discriminatee failed to mitigate, the respondent counsel may call an expert witness familiar with the labor market in the area where most of the discriminatees were living and seeking work during the backpay period. Where appropriate, in preparation for cross-examination and rebuttal, the trial attorney should interview knowledgeable local officials of the state employment service and knowledgeable union officials, particularly of skilled trades unions, to obtain a complete understanding regarding what impact, if any, the local market conditions had on the search for work of people with the skills and experience of the discriminatees. Information regarding local area, private sector, employment and unemployment rates during the backpay period, may be obtained from the U.S. Department of Labor, Bureau of Labor Statistics. www.bls.gov. This website also provides information regarding private sector gross job gains and losses by industry. Links are provided to state work force agencies.

The respondent's witnesses may be expected to testify concerning the number of job vacancies that existed in the employment area during the backpay period. The trial attorney, on the basis of pretrial interviews, should be prepared to elicit testimony concerning not only the number of job vacancies, but the number of vacancies within the job experience and background of the discriminatees, the rates of pay offered and the number of people remaining unemployed on the rolls of the state employment service or union simultaneous with the existence of the job openings.

10660.7 Settlement Judge

If settlement efforts have not been successful following the issuance of the compliance specification, the Region should consider whether a settlement judge would be beneficial. Most often, participation by the Compliance Officer at this conference is beneficial. Section 102.35(b), Rules and Regulations, provides for the assignment of an administrative law judge (herein a settlement judge), other than the trial judge, to conduct conferences and settlement negotiations, if all parties agree to the use of the procedure. See also Section 102.59, Rules and Regulations. See ULP Manual Sections 10351 and 10154.2 for a complete discussion of settlement judge prehearing conferences. See also Division of Judges Bench Book Section 9-900.

10660.8 Prehearing Conferences with Administrative Law Judge

The administrative law judge may conduct, at the request of the parties or on the judge's own initiative, a prehearing conference prior to the hearing's opening. The conference provides the opportunity to:

- further explore settlement,
- discuss potential stipulations and joint exhibits,
- the order of evidence presentation and witness testimony at hearing,
- resolve outstanding subpoena issues,
- clarify the pleadings and theories set forth in the compliance specification and answer,
- advise the judge of any anticipated hearing issues,
- advise the judge of the need for foreign language witness interpretation,¹⁷¹
- advise the judge of a party's intention to call an expert witness,
- provide the opportunity to refresh the judge's knowledge regarding the specific burdens of proof accorded the General Counsel and respondent, regarding the compliance specification and answer as set forth in Sections 102.55 and 102.56 of the Rules and Regulations.

Sections 10648.4–10648.6 and 10660.6; ULP Manual Section 10381; Division of Judges Bench Book Section 9-220.

10662 Conduct of the Compliance Hearing

10662.1 Overview

The conduct of a compliance hearing is governed in large part by the General Counsel's burden of proof, set forth in Section 10648.6, and Section 102.56 of the Rules and Regulations, which requires that the respondent raise its defenses in its answer. ULP Manual Sections 10380–10412 regarding hearings in complaint cases are also generally applicable to compliance hearings.

10662.2 Specificity of Answer, Motion to Preclude

If the respondent's answer is insufficient with respect to any allegations of the compliance specification, it is appropriate to move that the administrative law judge deem those allegations to be admitted and to preclude the respondent from litigating those issues at the compliance hearing. Section 10652.2.

The necessary legal research and the drafting and submission of the motion papers, showing in detail in what respects the respondent's answer was defective, should be done well in advance of the date of the hearing to permit the administrative law judge an opportunity to rule on them. This will establish in advance the ground rules that will govern the hearing when it starts. At the hearing, the trial attorney should not seek to prove the allegations that have not been properly answered, and should make appropriate objection if the respondent attempts to raise such matters in the hearing.

10662.3 Litigation of Compliance Issues

Generally, in compliance proceedings, the trial attorney should not assume any part of the respondent's burden or litigate backpay issues not properly placed in issue by

¹⁷¹ See generally, Division of Judges Bench Book Section 13-607.

the answer, unless some gain to the case might be achieved. Sections 10648.4 and 10648.6. Normally, it will not aid the General Counsel's case to litigate defenses not properly raised by the respondent. However, there may be occasions when the General Counsel finds it advantageous to question a witness in its case on such matters as searching for interim employment or interim earnings. Such a situation would arise where the General Counsel determines that the evidence on the issue would best be presented through his or her own witness on direct examination (after careful preparation) rather than through cross-examination.

The trial attorney should be completely familiar with the case law arising under Section 102.56(b) of the Rules and Regulations and be vigilant that defenses not properly raised in the answer are not litigated at the hearing. The trial attorney should oppose all such efforts to do so and should not do so himself/herself.

In addition, although he/she may proffer evidence in areas in which the respondent has the burden of proof, the trial attorney should not only disavow in express words but should take particular care that by his/her conduct he/she do not place himself/herself in the position of assuming any burden of proof in areas that are properly the respondent's responsibility.

10662.4 Scope of the Region's Responsibility for Making Discriminatees Available as Witnesses for Respondent

Although the General Counsel may decide not to call any discriminatees as witnesses, the respondent will often desire to call discriminatees to prove its case. The trial attorney should cooperate with the respondent in its efforts to obtain the presence of the discriminatees to the extent that it is practicable and reasonable to do so.¹⁷²

Upon request, the trial attorney should furnish respondent with the desired discriminatee's present or last known address so that the individual may be subpoenaed or located. Subpoenas may be requested by respondent to compel the appearance and testimony of uncooperative discriminatees at compliance hearings. Should the discriminatee object to revealing their address for good cause, that individual may properly be asked to voluntarily waive formal service (but not fees and mileage) so long as it is agreed that testimony will be given at the time requested by the respondent. Should failure to accept service tend to prolong or delay the proceedings, the discriminatee's location should no longer be treated as confidential unless the most compelling reason exists.

10662.5 Formal Exhibits

At the outset of the hearing, the trial attorney should mark as Exhibit 1 and introduce into evidence the following papers:

- Board decision and order,
- Court decision and judgment,
- Compliance specification and Notice of Hearing, and any amendments,

¹⁷² For example, *Cornwell Co.*, 171 NLRB 342 fn. 2 (1968) ("[T]he General Counsel's function in producing backpay claimants for examination by Respondent is merely advisory and cooperative.") See also *Iron Workers Local 480 (Building Contractors)*, 286 NLRB 1328, 1334 (1987); and *Colorado Forge Corp.*, 285 NLRB 530, 541 (1987).

- Each Order Rescheduling Hearing,
- Affidavits of service,
- Respondent's answer and affidavit of service,
- Form NLRB-4668, Statement of Standard Procedure in Formal Hearing.

Relevant stipulations or documentation relating to proceeding to a compliance hearing before enforcement proceedings should also be introduced. Sections 10646.1 and 10606.2.

10662.6 Opening Statement

In the trial attorney's opening statement, he/she should normally state the factual and legal theory of the case. The trial attorney should be prepared to explain the various burdens of proof, where it appears appropriate to do so. Additionally, the trial attorney should present to the administrative law judge any problem of missing, distant, unavailable or deceased witnesses, clear up any problem with the use of the discriminatees as the respondent's witnesses and reasonably cooperate in securing their presence.

10662.7 Missing or Unavailable Discriminatees

If interim earnings are available for missing or unavailable discriminatees, their backpay claims should be treated like the claims of discriminatees who are present at the hearing. The burden of proving further offsets to backpay rests on the respondent.

If the respondent wants missing or unavailable discriminatees for testimony, the trial attorney should cooperate, such as by proposing to take depositions if credibility issues do not seem likely to become involved, or to move the hearing to a date, time, or place more convenient to the particular discriminatee. The trial attorney should argue in support of such procedures that the wrongdoer, rather than the injured party should bear the inconvenience and cost of travel. It is very important that the record reflect in the most detailed factual terms the cooperation proffered by the trial attorney to the respondent, whether it occurred before or at the hearing, and the fact that discriminatees were available to respondent as witnesses. To this end, the trial attorney should state, preferably in the opening statement, past offers and efforts of cooperation, as well as continued willingness to cooperate, and should elicit from the respondent its desires in the matter.

Before the hearing closes, counsel should summarize on the record all the respondent's requests for testimony by discriminatees and the result of the trial attorney's efforts at cooperation, lest it be subsequently claimed that the respondent was prevented from proving its defense(s). The administrative law judge should be requested to make findings concerning the gross backpay of missing or unavailable discriminatees for whom there is no interim earnings information. When these discriminatees are found, their interim earnings may be established and backpay paid. Section 10648.7. See also Section 10584 concerning the eventual extinguishment of backpay entitlement for a discriminatee who remains missing after compliance is otherwise achieved.

After a missing discriminatee has been found, a further compliance hearing may be held concerning interim earnings, mitigation, or any other issue that cannot be resolved informally.¹⁷³

10662.8 Deceased Discriminatees

The trial attorney should offer evidence of gross backpay and expenses regarding deceased discriminatees if the respondent's answer has put these elements in issue. The affirmative allegations in the compliance specification concerning interim earnings and unavailability for employment should be sufficient to complete the case. The respondent bears the burden of establishing further reductions from gross backpay. See also Section 10648.8.

10662.9 Interim Earnings Documents

Upon request, documentation of interim earnings for all discriminatees should be given to the respondent's counsel to offer in the record. The trial attorney should be careful to state on the record that although the General Counsel does not have the burden of proving interim earnings and that this is the respondent's burden, an offer is being made of documentary information of such matters in the interests of accuracy, to expedite the hearing, and as part of the General Counsel policy to offer as much assistance as possible to the respondent in presenting information relevant to backpay issues for the consideration of the administrative law judge. Documents concerning interim earnings that are discloseable, in unredacted and redacted form, are described in Section 10650.5. See also ULP Manual Section 11824.1.

All of these documents should have been provided to the respondent's counsel in advance of the hearing if they were requested and respondent fully cooperated in the compliance investigation. See Section 10650.5.

If the respondent refuses to agree to the admission of such exhibits, the offer should nevertheless be made on the record but no effort should be made to have them admitted over respondent's objection unless it is indicated by the administrative law judge that they would be helpful. The trial attorney should make clear on the record that the evidence on interim earnings was made available to the respondent in advance of hearing.

10664 The General Counsel's Case

10664.1 Compliance Officer Testimony

It is the General Counsel's burden to prove by a preponderance of the evidence that the gross backpay formula and amounts are reasonable.¹⁷⁴ That burden is normally met by the introduction of evidence and Compliance Officer testimony. In cases involving complex computations of gross backpay, the testimony of the Compliance Officer who prepared the computation is usually extremely helpful to the administrative

¹⁷³ For example, *Brown & Root, Inc.*, 132 NLRB 486, 495-497 (1961); see 327 F.2d 958, 959 (8th Cir. 1964), clarifying court's opinion in 311 F.2d 447, 456 (8th Cir. 1963), on this point. See also *Continental Insurance Co.*, 289 NLRB 579, 585 (1988); *Colorado Forge Corp.*, 285 NLRB 530, 542 (1987).

¹⁷⁴ *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001).

law judge and presents a frame of reference for the introduction of supplementary exhibits.¹⁷⁵

In the event the administrative law judge finds the entitlement of backpay of some discriminatees has changed on the basis of evidence introduced at the hearing, the Compliance Officer should also testify about adjusting the computation of backpay.

A respondent's proper allegation in its answer that the specification's gross backpay formula is incorrect or inappropriate will also set forth, with supporting data, an alternative method for computing gross backpay. The Compliance Officer may present testimony concerning the defects of the respondent's approach¹⁷⁶ or the defects may be relegated to argument by the trial attorney or included in a brief.

10664.2 Discriminatee Testimony

In most cases, the trial attorney should have a discriminatee testify only to prove expenses, to present facts necessary to the computation of gross backpay that cannot be otherwise established, and to anticipate known respondent defenses. Sections 10660.3, 10660.4, and 10662.3.

It is the General Counsel's burden to establish expenses incurred by a discriminatee. Section 10648.4. The discriminatee should, therefore, testify in detail concerning expenses incurred in seeking and maintaining interim employment, as well as, but not limited to, expenses incurred to replace employer benefits, such as medical coverage. Available documentation of expenses should also be presented. Because expenses incurred while seeking and maintaining interim employment have no effect on net backpay during quarters in which there were no interim earnings, testimony regarding expenses for such quarters is relevant only to establish efforts to seek employment.

10666 The Respondent's Case

10666.1 Respondent's Attack on Gross Backpay Computation

The respondent's attack on the General Counsel's gross backpay computation may take any number of forms. It will often be based on the testimony of company officials who will attempt to show that projected earnings alleged in the compliance specification were unreasonably high or that the earnings or hours of representative or replacement employees selected by the General Counsel were not representative of the probable earnings of the discriminatees.

When the respondent contests the validity of the representative complement of employees used to measure gross backpay, the trial attorney should consider whether, on rebuttal, the testimony of discriminatees or other employees would be helpful. The respondent may also present testimony or evidence to dispute fringe benefits claimed as elements of gross backpay.

Respondent's documents and employment records may be the best evidence of a discriminatee's entitlement to such benefits as vacations, bonuses and medical insurance.

¹⁷⁵ E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, 151 NLRB 972, 981-986 (1965); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 618 (1991).

¹⁷⁶ For example, *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, supra at 987-988; *Rainbow Coaches*, 280 NLRB 166, 173-178 (1986); *Big Three Industrial Gas*, 263 NLRB 1189, 1193-1196 (1982).

The respondent's witnesses may be cross-examined with regard to these documents and the respondent's practices with regard to the implementation of its benefits policies. The trial attorney may also find it advisable on rebuttal to question the discriminatees, other employees and, in the case of contractual benefits, appropriate union officials.

The respondent may attempt to prove that some change in its organization or operations terminated the backpay period because the discriminatee(s) would have been laid off at the time the change was made. This kind of contention should prompt a careful inquiry, including, as appropriate, an examination of relevant respondent records to determine what happened to other employees who worked in the same operation as the discriminatee(s). For example: were the employees affected by the change transferred to another operation, permanently laid off, or temporarily laid off and then recalled.

10666.2 The Respondent's Case Regarding Interim Earnings

The respondent may attempt to prove reductions from gross backpay by establishing interim earnings beyond those affirmatively alleged in the compliance specification. Evidence in the form of documents, testimony from other employers or witnesses and examination of the discriminatee may be used.

The trial attorney should scrutinize documents proffered to establish additional interim earnings and cross-examine witnesses who testify regarding additional employment.

The Compliance Officer and the trial attorney should ensure that discriminatees are aware that there are serious consequences for discriminatees who conceal interim earnings. The Board will deny any backpay for all quarters in which the discriminatee worked but concealed that information.¹⁷⁷ In the appropriate circumstance, the discriminatee may be denied backpay for the entire backpay period where the intentional concealment cannot be attributed to a specific quarter or quarters.¹⁷⁸ Section 10550.5.

10666.3 The Respondent's Examination of Discriminatees Regarding Mitigation

The respondent will often question the discriminatee in detail concerning the individual's search for work, including the names of firms to which the discriminatee applied, whether or not written applications were filed, whom the witness saw when application was made and other details.¹⁷⁹ The discriminatee may be asked whether he or she searched websites, reviewed newspaper want ads for available jobs or made job applications to other specific employers engaged in the same or similar business as the respondent. In this regard, the examination may also cover whether the discriminatee maintained a calendar or a diary setting forth search for work efforts. If appropriate, the questioning may also delve into whether the discriminatee sought employment through a hiring hall.

The respondent may also question the discriminatee concerning a claimed failure to mitigate by the discriminatee's accepting employment that is not substantially equivalent, voluntarily quitting an otherwise suitable job without justification or engaging in gross or deliberate misconduct that resulted in discharge. In the case of a voluntary

¹⁷⁷ *Performance Friction Corp.*, 335 NLRB 1117, 1121 fn. 25 (2001); *American Navigation Co.*, 268 NLRB 426 (1983).

¹⁷⁸ *Ad Art, Inc.*, 280 NLRB 985 (1986).

¹⁷⁹ See *Pope Concrete Products*, 312 NLRB 1171 (1993).

quit, the burden is on the General Counsel to show the decision to resign was reasonable. Where a discriminatee has been discharged by an interim employer, the Board will find a failure to mitigate if the discriminatee engaged in gross misconduct. Section 10558.4.

10666.4 Introduction Into Evidence of Newspaper Advertisements

The respondent may attempt to prove a lack of diligence in seeking interim employment by putting into evidence newspaper advertisements or other documentation showing the existence of jobs in the classifications of the discriminatees.

It should be argued that such evidence does not reliably establish either the general availability of jobs or that a discriminatee could have obtained a particular job. In oral argument or in a brief, it could be pointed out to the administrative law judge, if appropriate, that the advertisements said little about wage rates, working conditions, or the location of the position advertised. Further, advertisements did not show how many people applied for the jobs that were advertised and leave to pure speculation the likelihood that the discriminatees would have been employed.

10666.5 Contention of Willful Idleness Based on Testimony of Employment Agency

The respondent may also attempt to prove a lack of diligence through other testimony regarding the number of jobs available in the labor market during the backpay period.

Testimony of this kind should be thoroughly explored on cross-examination. To prepare for this, discussion in advance of the hearing with officials of the local state employment service may be appropriate. On cross-examination the respondent's witnesses should be requested to testify concerning the number of applicants in the skill classifications of the discriminatees who remained unplaced by the agency during the backpay period. The number of such persons who draw their maximum unemployment insurance benefits without obtaining a job should be obtained from the state employment service and placed in the record. In addition, testimony should be elicited from the witness, concerning jobs asserted to be available, to establish the location of job vacancies, their actual classifications, and the rates of pay offered. It may be argued that the discriminatees are not obliged to apply for or accept jobs if they are located relatively long distances from their homes, the rates of pay are excessively low, or they do not possess the required qualifications. If the witness is a person who does the hiring for another employer, they should be asked how many applicants are interviewed per job vacancy to be filled.

10666.6 Discriminatee's Decision Not to Return to Work

The respondent may also attempt to elicit testimony to the effect that discriminatees would not have returned to work at respondent by asking them whether they would have accepted reinstatement during the backpay period. The trial attorney should object to such a question on the grounds it is hypothetical.

Further, the Board has found it to be irrelevant that at some time prior to a valid offer of reinstatement, discriminatees have stated that they would not return to work. Section 10534.8 and cases cited therein.

10666.7 Respondent's Effort to Bar Reinstatement or Disparage or Discredit Discriminatees

The respondent may attempt to establish discriminatee misconduct in order to contend that, even in the absence of its unlawful action, the discriminatee would not have retained employment and that backpay should be tolled. The respondent assumes the burden of establishing that reinstatement is not warranted. Section 10532.4. Such contentions may be countered primarily through knowledge of the discriminatee's version of the alleged misconduct. If appropriate, the contentions should be challenged and testimony elicited to present the discriminatee in as favorable a light as possible.

Another defense against this type of attack is to investigate the possibility that other employees with like or worse records continued in the employ of respondent or that prior to the discrimination the respondent was aware of the misconduct and did not discharge the discriminatee.

10666.8 Rehabilitation of Discriminatees Regarding Mitigation

Respondent's examination or cross-examination of a discriminatee sometimes results in weaknesses in the record that were often caused by the confusion or misunderstanding of the discriminatee. Examination by the trial attorney should be undertaken with the aim to clarify earlier testimony and generally rehabilitate the discriminatee following examination by the respondent. Careful preparation in the advance of the hearing is very important in accomplishing the twin objectives of avoiding discriminatee confusion or misunderstanding as well as his/her rehabilitation, if required.

The goal, therefore, of the advance preparation is that, on examination, the trial attorney be able to bring out all the efforts made by the discriminatee during periods of unemployment to look for work, clarifying any testimony elicited by the respondent that varies with any documentary evidence or prior testimony. It is usually better to accomplish this through nonleading questions, where appropriate. If the discriminatee's credibility has been impugned, witnesses should be brought to the stand to corroborate the discriminatee's testimony.

As noted earlier, if the respondent establishes that the discriminatee quit an interim job, it becomes the burden of the General Counsel to demonstrate that the decision to quit was reasonable. Therefore, the trial attorney should be prepared to question the discriminatee with respect to the reasons the discriminatee voluntarily left any interim employment.

10666.9 Remote and Speculative Defense by Respondents

In some compliance hearings an unduly prolonged hearing and an unwieldy record may result from counsel pressing what can be characterized as rather remote and speculative claims to justify affirmative defenses. In the interest of keeping the length of the hearing and the record within reasonable bounds, the trial attorney may find it advisable to rely on the words of the Supreme Court as a basis for urging the administrative law judge to place some limits on the evidence that may be admitted on this issue:

The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will

thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).¹⁸⁰

10668 Briefs to the Administrative Law Judge

Briefs are particularly helpful following compliance hearings, especially where a detailed analysis and explanation of payroll, unemployment, and other financial documents introduced into evidence will assist the administrative law judge in understanding the General Counsel’s theory of the case. Similar to unfair labor practice trials, briefs also are advisable where the case involves difficult credibility issues, a long record or complex issues or where legal argument may be helpful to the administrative law judge. General briefing guidelines are set forth in ULP Manual Section 10410. Sections 102.42 and 102.59, Rules and Regulations.

When filing a brief to the administrative law judge following a compliance hearing, consideration should be given to the following points:

- It may be helpful to include charts, tables, and graphs in the brief to summarize voluminous or complex payroll or other financial records introduced into evidence.
- If the General Counsel has advanced an alternative theory at the hearing, the alternative calculations should be set forth in the brief, together with argument and case law supporting this alternative theory.
- If an alternative theory for calculating backpay or the make whole remedy is raised at trial, and the theory appears to be of particular concern or interest to the administrative law judge, the alternative calculations associated with this theory should be set forth in the brief, together with the General Counsel’s argument and case law supporting or opposing this alternative theory.
- All requested remedies must be clearly articulated, including any special remedies. Argument and case law supporting the remedies requested should be provided.

10670 Bankruptcy

10670.1 Overview

In processing cases in which a charged party or respondent has filed a bankruptcy petition, the Region should promptly determine what actions should be taken to protect the Agency’s interests in the bankruptcy proceeding and should thereafter become actively involved in the bankruptcy proceeding in order to maximize the opportunity for the Agency to obtain a recovery on its claim.

¹⁸⁰ See also *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968), enfg. 153 NLRB 1575 (1965); *Corning Glass Works v. NLRB*, 129 F.2d 967, 973 (2d Cir. 1942).